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Supreme Court, U.S.
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No. 03-1475

In the Supreme Court of the United States

KEVIN RICE, PETITIONER,

v.

TERRY MCCANN, WARDEN, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit's factbound application of the AEDPA's deferential standard for reviewing final state court judgments, which declined to disturb the Illinois Supreme Court's factbound application of the four-part test set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973), was correct.

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BRIEF IN OPPOSITION

The standard employed by federal habeas courts is by now altogether familiar: under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a habeas petitioner may obtain relief if the state court's judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The deference required by the AEDPA reaches its apex where the "clearly established Federal law" applied by the state court consists of a general, multifactor standard. See *Yarbarough v. Alvarado*, 124 S. Ct. 2140, 2149-2150 (2004).

In this case, petitioner sought habeas relief on the ground that the Illinois Supreme Court unreasonably applied the four-factor test set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973), to the particular facts of his case. The Seventh Circuit held that the Illinois Supreme Court's factbound application of *Chambers* was not unreasonable. In so holding, the court correctly applied the AEDPA's deferential standard. More importantly for present purposes, the Seventh Circuit's decision conflicts with no decision from this Court or from any other circuit. Finally, this Court denied certiorari on petitioner's *Chambers* claim when this case was on direct review, and there is even less reason to grant certiorari now, when the case is on collateral review, than there was then. For these reasons, certiorari should be denied.

STATEMENT

A. On June 13, 1989, Chicago police officers Robert Drozd and Michael Cronin pulled over a car for speeding. Officer Drozd approached the passenger's side of the vehicle, while Officer Cronin approached the driver's side. Through the open passenger window, Officer Drozd observed petitioner, who was

the driver, hand a brown paper bag to the passenger, Raymond Pugh. Believing that the bag contained a weapon, Officer Drozd ordered Pugh out of the car and conducted a pat-down search. Officer Drozd recovered the bag and found what appeared to be an illegal substance, which subsequent lab tests revealed to be heroin. Officer Drozd informed Officer Cronin that he had observed petitioner transfer the bag to Pugh. At this point, Officer Cronin arrested petitioner. Pet. App. 2.

B. Petitioner and Pugh were tried together. Before trial, Pugh moved to suppress the heroin. Pugh testified that he had placed the bag down his pants two hours before he and petitioner were stopped by the officers. Thus, according to Pugh, Officer Drozd could not have observed the bag prior to the pat-down search, which means that he could not possibly have had probable cause to conduct the search. The State presented testimony that petitioner indeed transferred the bag to Pugh. The trial court denied Pugh's motion to suppress. Pet. App. 2-3.

At trial, Officer Drozd testified that he saw petitioner hand Pugh the paper bag and watched Pugh put the bag down his pants. After the State rested, petitioner denied handling the bag or the heroin and called Pugh to testify that Pugh had placed the bag down his pants two hours earlier. Pugh invoked his Fifth Amendment right not to testify. Petitioner moved to admit Pugh's suppression hearing testimony, but the trial court denied the motion on hearsay grounds. The jury convicted petitioner of possession of heroin with intent to deliver, and the trial court sentenced him to twenty years in prison. Pet. App. 3.

C. The Illinois Appellate Court reversed the conviction, holding that the trial court violated *Chambers v. Mississippi*, *supra*, in refusing to admit Pugh's suppression hearing testimony at trial. *People v. Rice*, 247 Ill. App. 3d 415, 617 N.E.2d 360 (1993). *Chambers* holds that, under certain limited

circumstances, due process may require the admission of hearsay that otherwise would be barred by state law. 410 U.S. at 302. *Chambers* provides four factors to evaluate in considering whether such hearsay must be admitted: (1) whether the statement was made shortly after the crime to a close acquaintance; (2) whether other evidence or circumstances corroborate the statement; (3) whether the statement was self-incriminating and against the declarant's penal interest; and (4) whether the declarant was subject to adequate cross-examination. *Id.* at 300-301.

The Illinois Appellate Court held that Pugh's suppression hearing testimony satisfied three of the four *Chambers* factors — it was corroborated by other evidence, was against his penal interest, and was subject to cross-examination. 247 Ill. App. 3d at 419, 617 N.E.2d at 363. For that reason, the court concluded, the trial court's exclusion of Pugh's former testimony denied petitioner a fair trial.

D. The Illinois Supreme Court reversed and remanded, finding that *Chambers* did not require admission of Pugh's suppression hearing testimony. Pet. App. 15-29. The majority agreed with the Illinois Appellate Court that the third *Chambers* factor supported admission and the first factor weighed against admission. *Id.* 24-25. However, the court disagreed with the appellate court regarding the second and fourth *Chambers* factors, finding that Pugh's testimony was not corroborated by any other evidence, and was not subject to adequate cross-examination because the issues at stake in the suppression hearing were limited. *Id.* 25-26. The court also noted that Pugh's testimony, while technically against his penal interest within the meaning of the third *Chambers* factor, actually would have benefitted Pugh "because, if his testimony had been believed [at the suppression hearing], his motion [to suppress] would have been granted and the evidence against him suppressed." *Id.* 25.

Three Justices of the Illinois Supreme Court dissented. The dissent parted company with the majority with respect to only the fourth *Chambers* factor, contending that the State had an adequate opportunity to cross-examine Pugh at the suppression hearing. Pet. App. 28-29. The dissent did not address the disagreement between the majority and the Illinois Appellate Court regarding the first *Chambers* factor — *i.e.*, whether Pugh's suppression hearing testimony was corroborated by other evidence.

E. This Court denied petitioner's petition for writ of certiorari. *Rice v. Illinois*, 516 U.S. 932 (1995). That petition presented a question identical to the second question presented in this petition. See Petition for Writ of Certiorari in *Rice v. Illinois*, No. 95-337, at i ("Whether defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress . . . .").

F. After further unsuccessful proceedings on direct review and state post-conviction review, petitioner filed a habeas petition in federal district court, which was denied. See *Rice v. Bowen*, 2001 WL 1035262 (N.D. Ill.).

G. The Seventh Circuit affirmed. At the outset of its analysis, the majority noted that the AEDPA required the denial of habeas relief unless the Illinois Supreme Court's application of *Chambers* was objectively unreasonable. Pet. App. 4-5. The majority further noted that its role was not to determine whether the Illinois Supreme Court correctly held that Pugh's suppression hearing testimony was inadmissible under Illinois evidence law. *Id.* 5. Rather, assuming that Pugh's testimony was inadmissible under Illinois law, the court examined whether *Chambers* required the admission of that testimony as

a matter of federal due process — or, to be more precise, whether the Illinois Supreme Court was objectively unreasonable in holding that *Chambers* did not require admission.

The Seventh Circuit held that the Illinois Supreme Court's decision was not objectively unreasonable. The court noted that the Illinois Supreme Court and Illinois Appellate Court agreed on the first and third *Chambers* factors, and disagreed only on the second and fourth factors. Pet. App. 6-7. With respect to the second factor — which was the only factor that divided the Justices of the Illinois Supreme Court — the Seventh Circuit observed that the majority of the Illinois court "reasoned that because Pugh's suppression hearing focused on different issues then Rice's trial, the State could not have fully tested Pugh's reliability." *Id.* 7. The Seventh Circuit concluded that "[t]he Illinois courts' dispute over the *Chambers*' factors reveals that reasonable minds can differ as to the proper application of the law to the facts of Rice's case." *Ibid.*

Judge Posner dissented. Of the two *Chambers* factors that divided the Illinois Supreme Court and the Illinois Appellate Court, Judge Posner focused only on the opportunity for cross-examination at Pugh's suppression hearing, contending that the State's opportunity was adequate for *Chambers* purposes. Pet. App. 9-12. Judge Posner did not address whether Pugh's testimony was corroborated. *Id.* 9. Based upon his view of the cross-examination factor, Judge Posner concluded that the Illinois Supreme Court's application of *Chambers* was objectively unreasonable. *Id.* 12.

H. Petitioner filed petitions for rehearing and for rehearing en banc. All three members of the panel, including the dissenting judge, voted to deny rehearing. No judge in active service requested a vote on the en banc petition. Pet. App. 13-14.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari. Petitioner does not argue that the Seventh Circuit's application of the AEDPA conflicts with a decision of another federal court of appeals or this Court. Nor does petitioner identify any doctrinal matter that requires this Court's clarification. Rather, petitioner merely contends that the Seventh Circuit and Illinois Supreme Court incorrectly applied settled law to the particular facts of his case. Because this case involves only the Seventh Circuit's factbound application of the AEDPA, in which it declined to disturb the Illinois Supreme Court's factbound application of *Chambers*, certiorari should be denied.

In arguing that the Seventh Circuit incorrectly applied the AEDPA, petitioner simply quotes a substantial portion of Judge Posner's dissent. Pet. 10-13. But the fact that Judge Posner disagreed with the majority's application of settled law to the facts of this case does not warrant certiorari. Indeed, notwithstanding his dissent, Judge Posner did not find this case worthy of panel or en banc rehearing. Pet. App. 13-14.

For these reasons alone, certiorari should be denied. In any event, the Seventh Circuit's decision — that the Illinois Supreme Court's application of *Chambers* was not objectively unreasonable — was correct on the merits.

The defendant in *Chambers* was tried for a murder that a another person had confessed to committing. 410 U.S. at 292-293. Under Mississippi law, the defendant could not cross-examine the confessor or call the confessor's friends to testify at his trial. *Id.* at 291-294. This Court held that "under the facts and circumstances of this case," due process required that defendant be allowed to present the exculpatory testimony despite its noncompliance with state evidence law. *Id.* at 303. In so holding, the Court emphasized that a statement must bear

persuasive assurances of reliability to qualify for this exception. *Id.* at 302. As noted above, reliability under *Chambers* is measured by four factors: (1) whether the statements were made shortly after the crime to close acquaintances; (2) whether the statements were corroborated by other evidence; (3) whether the statements were self-incriminatory and unquestionably against interest, as the declarant "stood to benefit nothing" by disclosing his role in the crime; and (4) whether the declarant was available at trial for cross-examination. *Id.* at 300-301.

With respect to the first factor, the Illinois Supreme Court found that Pugh's suppression hearing testimony was not a spontaneous statement to a close acquaintance, but rather was made twenty-two months after the officers seized the heroin. Pet. App. 25. With respect to the second factor, the court held that Pugh's former testimony was not corroborated by any other evidence. *Id.* 26.

With respect to the third factor, the court found that Pugh's suppression hearing testimony was against his penal interest, which weighed in favor of admissibility under *Chambers*. Pet. App. 24. Still, the court tempered that finding by noting that Pugh "stood to benefit at the suppression hearing by making the statement in question because, if his testimony had been believed, his motion would have been granted and the evidence against him suppressed." *Id.* 25. This necessarily diminished the importance of this factor. After all, a principal rationale of the *Chambers* rule — that "a person is unlikely to fabricate a statement against his own interest at the time it is made," *Chambers*, 410 U.S. at 299 — is absent here because, at the time Pugh offered his suppression hearing testimony, it was functionally *not* against his penal interest.[1]

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[1] Pugh's suppression hearing testimony could not have been used against him at his criminal trial. *Simmons v. United States*, 390 U.S. 377, 389-390 (1968). Despite *Simmons*, petitioner argues that

Finally, with respect to the fourth factor, the Illinois Supreme Court found that the State's cross-examination of Pugh during the suppression hearing was limited. The issue during the suppression hearing was whether Officer Drozd saw Pugh tuck a brown paper bag into his pants, thus providing probable cause to search Pugh. Pet. App. 25. Given the limited focus of the suppression hearing, the court found, the State limited its cross-examination to Pugh's actions prior to the search, his self-interest in testifying falsely, and issues presented by the motion to suppress. *Id.* 21, 25. The issue at the criminal trial, by contrast, was guilt or innocence, and the State's focus in cross-examining Pugh at trial would have been "any motive [Pugh] might have in making exculpatory statements on behalf of defendant." *Id.* 21.

For these reasons, the Illinois Supreme Court found that *Chambers* did not require the admission of Pugh's suppression hearing testimony at petitioner's criminal trial. This straightforward application of *Chambers* was correct. True, three Justices of the Illinois Supreme Court dissented on the ground that the majority had misapplied the fourth *Chambers* factor. Pet. App. 28-29. But the majority's finding that there was inadequate opportunity to cross-examine Pugh at the suppression hearing — which relied in large part upon the different purposes of the suppression hearing and the criminal trial — is sound. See 2 J. Strong, *McCormick on Evidence* § 304, at 315 (4th ed. 1992) ("similar motive" requires, "[a]t

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Pugh's testimony was against his interest because it could have been used to impeach Pugh if he testified at trial. Pet. 17 (citing *Harris v. New York*, 401 U.S. 222 (1971)). However, there is no "interest" in committing perjury. *Harris*, 401 U.S. at 225 ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.") Thus, Pugh's suppression hearing testimony was not against a *valid* interest of his.

most, the issue on which the testimony was offered in the first [proceeding] must be the same as the issue upon which it is offered in the second"). Moreover, although Pugh was subject to cross-examination at the suppression hearing, "his demeanor and responses [were not] weighed by the jury." *Chambers*, 410 U.S. at 301.

Is the Illinois Supreme Court's application of *Chambers* unassailable? Of course not, as the Seventh Circuit majority candidly acknowledged. Pet. App. 7-8. But the Illinois court's decision, even if open to question, was not objectively unreasonable under the AEDPA. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

This deference is particularly acute where, as here, the state court applied a general, multifactor test. In *Yarborough v. Alvarado*, 124 S. Ct. 2140 (2004), this Court considered whether the state appellate court had unreasonably applied the test for determining whether a suspect is in custody for *Miranda* purposes. The Court noted that the custody determination depends upon numerous factors. *Id.* at 2149-2150. The Court characterized this type of multifactor test as a "general" rule, which "can demand a substantial element of judgment." *Id.* at 2149. Given this, a federal court operating under the AEDPA must give "more leeway" to a state court's application of such general rules. *Ibid.*

The *Chambers* rule is precisely such a general, multifactor test. The majority of the Illinois Supreme Court found that three of the four *Chambers* factors weighed against admissibility. And while finding that the fourth factor (whether Pugh's statement was against his penal interest) technically weighed in favor of admissibility, the court recognized Pugh's former testimony was actually not against his penal interest at the time it was given. The dissent disagreed with the majority with respect to only one factor, that regarding the adequacy of cross-examination at Pugh's suppression hearing. The message of *Yarborough*, however, is that disagreement over a state court's analysis of one factor of a four-factor test cannot support a conclusion that the state court's analysis was objectively unreasonable.

None of petitioner's other authorities supports his position. Petitioner relies on *Ohio v. Roberts*, 448 U.S. 56 (1980), which concerns the interplay between the hearsay rule and the Confrontation Clause. Pet. 18-20. But this case does not concern whether the trial court admitted hearsay proffered by the prosecution over the defendant's Confrontation Clause objection; Here, petitioner argues that his due process rights required that the trial court accept his tender of Pugh's suppression hearing testimony. *Roberts*, therefore, has no conceivable application here — which is no surprise, given that neither the Seventh Circuit nor the Illinois Supreme Court even cited *Roberts*. It follows that this Court abrogation of *Roberts* in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), is likewise immaterial.

Petitioner also relies on two cases that interpret exceptions to the hearsay rule under the Federal Rules of Evidence, *Bourjaily v. United States*, 483 U.S. 171 (1987) (Rule 801(d)(2)(E), co-conspirator exception), and *United States v. Salerno*, 505 U.S. 317 (1992) (Rule 801(b)(1), the former testimony exception). Pet. 19. But the Federal Rules of

Evidence are not binding on the state courts, and thus have no application on federal habeas review.

In this end, petitioner seeks review of the Seventh Circuit's factbound, splitless application of settled habeas law to the Illinois Supreme Court's factbound, splitless application of *Chambers*. This case does not warrant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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